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Supreme Court of the United States

No. 403.

JERRY R. McCOY, PETITIONER,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY, A CORPORATION, RESPONDENTS.

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

EDWIN DABNEY,
Attorney General of Oklahoma.

V. P. CROWE,
Assistant Attorney General of said State.

Counsellors for Respondent.

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INDEX.

Page

Motion to dismiss petition for writ of certiorari..... 1- 2

Statement of case..... 3

Statement of merits..... 4- 5

No Federal question decided..... 5

Non-Federal grounds sustain judgment..... 6- 7

Writ not granted if non-Federal grounds sustain judgment..... 7-10

Table of Cases Cited.

A. T. & S. F. v. Sowers, 213 U. S. 55, 53 L. ed. 695..... 8

Black v. Geissler, 58 Okla. 335, 159 Pac. 1124..... 7

Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941..... 4

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111..... 8

Forbes v. Gracey, 94 U. S. 762..... 4

Fowler v. Lamson, 164 U. S. 252, 41 L. ed. 42..... 8

Gillespie v. Okla., 257 U. S. 501, 66 L. ed. 338..... 4

Going v. Carter Oil Company, 214 Pac. 922..... 7

Goudy v. Meath, 203 U. S. 146, 51 L. ed. 130..... 4

Kelly v. Keys, 62 Atl. 911..... 4

Kelly v. Ohio Oil Company, 57 Ohio St. 317, 49 N. E. 399.. 4

Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118..... 8

Murdock v. City of Memphis, 20 Wall. 590, 87 U. S. 590.. 8

Nonomaker v. Amos, 76 N. E. 949, 4 L. R. A. (N. S.) 980.. 4

Sauer v. City of New York, 206 U. S. 536, 546-7..... 8

Shelton v. Platte, 139 U. S. 591, 35 L. ed. 273..... 7

Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610..... 7

Ward v. Love County, 253 U. S. 17, 64 L. ed. 751..... 8

Table of Statutes Cited.

Act of Congress, May 27, 1808, 35 St. 312..... 3

Act of Congress, June 28, 1898, 30 Statutes 495..... 4

Compiled Oklahoma Statutes 1921, Section 9814..... 3

Compiled Oklahoma Statutes 1921, Section 9971.....3, 6

Compiled Oklahoma Statutes 1921, Section 9973..... 7

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A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY, A CORPORATION, RESPONDENTS.

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

Comes now A. S. J. Shaw, State Auditor of the State of Oklahoma, respondent herein, and respectfully prays that this Honorable Court dismiss the application of petitioner herein for a writ of certiorari to be directed to the Supreme Court of the State of Oklahoma, and as grounds therefor shows:

I.

That there is no Federal question decided by the Supreme Court of the State of Oklahoma in the case.

II.

That the State Court decided the case against the petitioner on independent non-Federal grounds broad enough to sustain such judgment.

III.

That this Court will not review a decision of a State court where that court decides a case on independent non-Federal grounds broad enough to sustain such judgment.

Wherefore, respondent prays that the application of petitioner for writ of certiorari be dismissed and that the writ be denied, and for such other and further relief in the premises as this Honorable Court may deem appropriate.

A. S. J. Shaw,
Respondent.

Edwin Dabney,
Attorney General.

V. P. Crowe,
Ass't. Atty. General.

Counsellors for Respondent.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS.

STATEMENT OF CASE.

The petitioner Jerry R. McCoy, a Chickasaw Indian of one-fourth Indian blood, received land patented to him, situated in Carter County, Oklahoma. A lease was executed by him to the Pure Oil Company without the supervision of the Department of the Interior, the said land so leased not being restricted against alienation under Section 1, Act of Congress of May 27, 1908, 35 Statutes 312. Oil was produced from said land so leased and royalty was reserved to the said McCoy, upon which royalty the State of Oklahoma, by the respondent herein, sought to collect the tax imposed thereon by Section 9814, Compiled Oklahoma Statutes 1921. Petitioner sought to enjoin the State Auditor of the State of Oklahoma from collecting said tax and the Supreme Court of the State of Oklahoma in the decision here sought to be reviewed (R. 16-24) held that the remedy by injunction under the statutes of Oklahoma was not available to petitioner but that his remedy was an action at law to recover taxes paid under protest as provided for in Section 9971, Compiled Oklahoma Statutes 1921.

Petitioner herein seeks to have a writ of certiorari issued to review the decision of the State court denying him injunctive relief.

STATEMENT OF MERITS.

It is conceded by respondent that by Section 29, Act of Congress June 28, 1898, 30 Statutes 495, all the lands allotted to the petitioner were non-taxable by the State so long as title thereto remains in the original allottee but not to exceed twenty-one years from date of patent.

The State of Oklahoma is not here seeking to tax the land so allotted to the petitioner, the right to tax such land being denied by the case of *Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941. The State here seeks to tax the oil of the petitioner produced from his land which when severed from the soil in which it is embedded becomes and is personal property distinct and separate from the land and, therefore, not exempt from State taxation.

Forbes v. *Gracy*, 94 U. S. 762.
Kelly v. *Ohio Oil Company*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765.
Nonomaker v. *Amos*, 76 N. E. 949, 4 L. R. A. (N. S.) 980.
Kelly v. *Keys*, 62 Atl. 911.

The property of an Indian, unless exempt from taxation, is taxable in the same manner as property belonging to other citizens and the rule for him is the same as other citizens, that is, no exemption exists by implication but must be clearly manifest.

Goudy v. *Meath*, 203 U. S. 146, 51 L. ed. 130.

The case of *Gillespie* v. *State of Oklahoma*, 257 U. S.

501, 66 L. ed. 338, relied upon by petitioner, denied the power of the State of Oklahoma to collect an income tax on oil produced by a lessee of restricted Indian land under a departmental lease for the reason that such taxation is an unconstitutional interference with a Federal instrumentality. It cannot apply here for the reason that the petitioner's land is unrestricted land and is, therefore, not under the supervision of the Federal government.

The same distinction may be made as to all decisions dealing with the taxability of Indian land or the products thereof where such land is restricted against alienation and is, therefore, supervised by the government.

No Federal question was decided by the Supreme Court of Oklahoma.

The entire opinion of the Supreme Court of Oklahoma is found in the record, pages 16 to 24, inclusive. The opinion itself discloses that it holds only that petitioner under the laws of the State of Oklahoma cannot enjoin the collection of the tax in question but must pay the same under protest and sue to recover the same. The opinion in the case is addrsesed solely to the remedy available to petitioner and nowhere decides or determines any Federal question. In fact, petitioner admits that the Supreme Court of Oklahoma based its decision on independent non-Federal grounds (Petitioner's brief, page 14).

The independent non-Federal grounds upon which the State Court decided the case are broad enough to sustain the judgment.

The Supreme Court of Oklahoma held that the petitioner's sole and exclusive remedy was provided for by Section 9971, Compiled Oklahoma Statutes 1921, which is as follows:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the State, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

By Section 9973, Compiled Oklahoma Statutes 1921.

the remedy by injunction against an illegal tax is specifically taken away as follows:

> "SPECIAL TAX—PAYMENT TO STATE AUDITOR—PAYMENTS UNDER PROTEST. None of the acts herein required to be done, shall be enjoined by a court of equity, but any person aggrieved in any matter of collection, assessment of levy of any tax herein provided for shall pay the tax at the time and in the manner provided by law, except as stated in Section 2, Article 2-B, herein, and at the time of payment shall file a written statement with the State Auditor, under oath, as provided in Section 10-11, Article 2-B, hereof, fully setting forth his complaint. The Auditor shall retain the payment as a special deposit to await the final decision on said complaint. And thereupon the same right of hearing and review shall be had upon said complaint as provided for herein in Section 10-11 of Article 2-B hereof."

Where a remedy is provided for the payment of an alleged illegal tax under protest with suit to recover the same, such remedy is plain, speedy, adequate and exclusive.

> *Black et al.* v. *Geissler*, 58 Okla. 335, 159 Pac. 1124.
> *Going* v. *Carter Oil Company*, 214 Pac. 922.
> *Tennessee* v. *Sneed*, 96 U. S. 69, 24 L. ed. 610.
> *Shelton* v. *Platte*, 139 U. S. 591, 35 L. ed. 273.

This Court will not review a decision of State court based on independent non-Federal grounds and broad enough to sustain the judgment.

A review on writ of certiorari is not a matter of right but of sound discretion and will be granted only where there are important reasons therefor, and before the writ may

be granted to review the decision of a State court it must appear that a federal question was actually decided by that court.

Rules, Supreme Court of the United States, No. 35, subdivision 5.
Murdock v. *City of Memphis*, 20 Wall. 590, 87 U. S. 590.
Leathe v. *Thomas*, 207 U. S. 93, 52 L. ed. 118.
Eustis v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111.
A., T. & S. F. v. *Sowers*, 213 U. S. 55, 53 L. ed. 695.
Fowler v. *Lamson*, 164 U. S. 252, 41 L. ed. 424.
Sauer v. *City of New York*, 206 U. S. 536, 546-7.
Ward v. *Love County*, 253 U. S. 17, 64 L. ed. 751.

The case of *Ward* v. *Love County*, *supra*, is much relied upon by petitioner. In that case the petitioner was an Indian who had sued to recover taxes alleged by him to be illegal. The Supreme Court of the State of Oklahoma had held that the taxes were voluntarily paid and hence could not be recovered. In reviewing the decision of the State court in that case, this Court found from the facts that the taxes were not in fact paid voluntarily but were paid involuntarily through the protest which the Indians were making in the State of Oklahoma in numerous suits denying the right of the State to tax their land.

The effect of that decision, therefore, is that the grounds upon which the State court decided the question were not sufficiently broad to sustain the judgment, and that the facts showed that the tax statute of Oklahoma re-

quiring taxes to be paid under protest and suit instituted to recover the same was in fact being followed by the petitioner. In the opinion the court said:

> "We accept so much of the Supreme Court's decision as held that if the payment was voluntary, the moneys could not be recovered back in the absence of a permissive statute, and that there was no statute. But we are unable to accept its decision in other respects."

Further in the decision, this court said:

> "It, therefore, is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect as by putting forward non-Federal grounds of decision that were without any fair or substantial support (citing cases). With this disqualification it is true that a judgment of a State court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us."

The position of the petitioner in this case differs from his position in the Ward case in that here he ignores the statutory requirements of the State of Oklahoma for testing the legality of a tax and seeks to tie up the revenues of the State of Oklahoma by a writ of injunction. This Court, in the Ward case, did not decide that the remedy provided by paying taxes under protest and suing to recover them was inadequate but merely held from the facts in the case that the Indians there followed the tax statute of the State of Oklahoma by paying their taxes involuntarily.

The decision of the State court, which is here sought to be reviewed, is based solely upon the construction given to the statutes of the State of Oklahoma and relates only to the remedy which the petitioner has under the laws of the State of Oklahoma. Had petitioner invoked such remedy he might readily have had the merits of his case decided by the Supreme Court of the State of Oklahoma on the Federal questions raised in the record.

Since the independent non-Federal grounds upon which the decision of the State court is based are broad enough to support the judgment, we respectfully urge that petitioner's application for a writ of certiorari be dismissed and the writ denied.

Respectfully submitted,

EDWIN DABNEY,
Attorney General of Oklahoma.

V. P. CROWE,
Assistant Attorney General of said State.

Counsellors for Respondent.